IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

BETWEEN:

DR RACHAEL KENT

Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD

Defendants

REASONED ORDER

UPON the Class Representative's application dated 8 August 2024 in relation to confidentiality designations of information in the expert reports and witness statements filed in the proceedings (the "Application")

AND UPON reading further correspondence from the parties in relation to the Application

AND UPON reading the revised schedule filed by the Class Representative on 13 September 2024 (the "Examples Schedule") in relation to the Application

AND UPON hearing counsel at a remote case management conference on 26 September 2024

AND UPON the Chair providing a revised Examples Schedule on 26 September 2024 containing his decisions in relation to the remaining examples in dispute

AND UPON the Class Representative's application for costs dated 17 October 2024, and enclosures, in relation to the Application

AND UPON reading the Defendants' submissions dated 24 October 2024 in response to the Class Representative's application for costs

IT IS ORDERED THAT:

1. Costs of the Application be costs in the case.

2. There be liberty to apply.

REASONS

1. The Class Representative ("CR") applies for her costs, on an indemnity basis, of the Application relating to the confidentiality designations applied by the Defendants ("Apple") to expert reports and other documents.

2. By way of background, there has been a running dispute between the parties as to the extent of justifiable confidentiality redactions made by Apple to documents on the basis of protection of Apple's legitimate business interests under paragraph 1(2) of Schedule 4 to the Enterprise Act 2002 and Rule 101(2) of the Competition Appeal Tribunal Rules 2015. That led to the CR issuing the Application, in which it is explained that difficulties had occurred in the implementation of the Confidentiality Ring Order (as amended and dated 23 October 2023) (the "CRO") in these proceedings, which set out a mechanism for resolving disputes of this kind. The CR's essential complaint was that Apple had failed to comply with the requirements of the CRO, which required identification of the reasons for individual redactions within a specified period of time.

3. In response to the Application, further steps were taken by Apple to review the redactions and this resulted in a substantial reduction in the number and extent of redactions applied to the relevant documents (which included the expert reports). However, the CR continued to challenge the extent of redactions and renewed her application by way of the Examples Schedule, on which the CR sought a ruling from the Tribunal. There were fifteen examples in the table. Following a discussion of these items at an informal CMC on 26 September 2024, I issued a ruling on each of them. I decided that fourteen of the redactions were justified and one was not.

4. Throughout this process, the Tribunal has encouraged the parties to adopt a cooperative

approach. For example, the Tribunal's letter of 14 August 2024 stated:

> "It is obviously in the interests of the parties (and their counsel in particular) as well as the Tribunal and the public interest that the extent of material which is to be treated as confidential for the purposes of the trial is limited as far as is sensibly possible. The Tribunal therefore encourages the parties to liaise in order to find a suitable way to efficiently identify material for which there is a genuine basis for protection by way of confidentiality."

5. The CR's position on costs is that the Application should have been unnecessary and that Apple has not complied with its obligations to deal with the confidentiality redactions, requiring the CR to incur unnecessary costs, including in issuing the application. That, the CR says, is evidenced by the considerable change in position taken by Apple once the Application was issued. Apple's conduct was therefore such as to justify an award of indemnity costs.

6. Apple says that the Application was premature, as the parties were working constructively towards a solution to the confidentiality issues. The progress made after the Application was issued would have happened anyway. In any event, the CR has not been successful in her Application, as she was substantially unsuccessful in the outcome (only one out of fifteen challenges upheld). In such circumstances, an award of any costs, let alone indemnity costs, is inappropriate. The correct order is costs in the case or alternatively that each party bears its own costs.

7. As is recognised in the Practice Direction (Disclosure – Management of Confidential Information) issued by the Tribunal on 4 January 2024, it will often be the case that a relatively broad approach is taken to confidentiality designation at early stages of a proceeding, with a more focused review taking place as trial approaches. That is particularly likely to be the case where a party has been required to disclose a large amount of financially or strategically sensitive information, as is the position in these proceedings, where Apple faces, among other things, allegations of excessive pricing. Experience suggests that it can be challenging to get the balance right between the legitimate protection of the business interests of the disclosing party and the principles of open justice and the ability of the receiving party to conduct their case.

8. It is (as the Tribunal has repeatedly reminded the parties in these proceedings) essential that the parties adopt a pragmatic and co-operative approach to achieving that balance. The Tribunal also stands ready to rule on examples where the parties are unable to resolve things between them, but this should be seen as a last resort and a means to resolve issues

of principle, not extensive lists of redactions.

9. That is in fact what has happened in this case, although the means by which it has been achieved have been considerably more contentious than I consider appropriate. I am not able to determine whether that is more the result of Apple's conduct (failing to comply with the CRO in a timely manner, taking unreasonable preliminary positions and possibly dragging their feet on the process) or the CR's approach (resorting to formal applications prematurely and treating the matter as more adversarial than is appropriate). My suspicion is that there is a good element of both in the way things have unfolded. In any event, I agree with Apple that, in strict terms, the CR was not ultimately successful in the Application, given that by the time I resolved it she only succeeded in one out of fourteen examples put forward. I am therefore not persuaded by the CR's application for costs and decline to award costs in her favour. It follows that I see no basis to award indemnity costs. Costs associated with the Application should be in the case.

10. I would expect other parties faced with similar issues to adopt a more constructive approach to resolving them. The Tribunal recognises that the judgements required are not always easy and the Tribunal is willing to play a role in resolving examples in order to assist the parties in reaching an agreed way forward. It is in the interests of everyone that the right balance is struck, not least because the conduct of trials where there is excessive confidentiality redaction is problematic for all involved. It is also necessary for this issue to be grasped at an early stage if there is extensive material to consider, given that it may take some time and effort to resolve.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 28 October 2024
Drawn: 28 October 2024